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No. 356

In the Supreme Court of the United States

OCTOBER TERM, 1929

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

THE PILLIOD LUMBER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 8–10) is reported in 7 B. T. A. 591. The opinion of the Circuit Court of Appeals (R. 12–16) is reported in 33 F. (2d) 245.

JURISDICTION

The decree of the Circuit Court of Appeals was entered June 3, 1929. (R. 12.) Petition for writ of certiorari was filed August 29, 1929, and granted October 21, 1929. (R. 17.) The jurisdiction of this Court is invoked under Section 240 (a) of the

Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Is the filing of an unsigned and unsworn tax return sufficient compliance with the provisions of Section 239 of the Revenue Act of 1918 to set in motion the five-year limitation of Section 277 (a) (2) of the Revenue Act of 1924, within which income and excess-profits taxes imposed by the Revenue Act of 1918 must be assessed and collected?

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1081, 1083, are as follows:

> SEC. 239. That every corporation subject to taxation under this title and every personal service corporation shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer. * * *
>
> * * * * * *
>
> SEC. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or

was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

The pertinent provisions of the Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 301, are as follows:

SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1918, * * * shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

SEC. 280. If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax)

shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277.

Article 407 of Treasury Regulations 45 (1919 ed.), promulgated April 17, 1919, provides:

Copies of the prescribed return forms will so far as possible be furnished taxpayers by collectors. Failure on the part of any taxpayer to receive a blank form will not, however, excuse him from making a return. Taxpayers not supplied with the proper forms should make application therefor to the collector in ample time to have their returns prepared, verified and filed with the collector on or before the last due date. Each taxpayer should carefully prepare his return so as fully and clearly to set forth the data therein called for. Imperfect or incorrect returns will not be accepted as meeting the requirements of the statute. In lack of a prescribed form a statement made by a taxpayer disclosing his gross income and the deductions therefrom may be accepted as a tentative return, and if filed within the prescribed time a return so made will relieve the taxpayer from liability to penalties, provided that without unnecessary delay such a tentative return is replaced by a return made on the proper form. * * *

The regulations since then have remained unchanged. See Regulations 45 (1920 ed.), Revenue Act of 1918; Regulations 62 (1922 ed.), Revenue Act of 1921; Regulations 65, Revenue Act of 1924; Regulations 69, Revenue Act of 1926.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 7–8) are as follows:

On or about March 14, 1919, the Pilliod Lumber Company executed and filed with the Collector of Internal Revenue for the Tenth District of Ohio a tentative return and estimate of its corporation income and profits taxes for the calendar year ending December 31, 1918, signed and sworn to by L. N. Pilliod, president, and T. J. Pilliod, treasurer, on March 14, 1919, on a form entitled "Tentative Return and Estimate of Corporation Income and Profits Taxes and Request for Extension of Time for Filing Return." It contained the following:

> *Collector of Internal Revenue, Toledo, Ohio:*
>
> The amount stated below is remitted herewith in payment of not less than one-fourth of the estimated amount of the income, war-profits, and excess-profits taxes for the year ended December 31, 1918, of the corporation whose name and address appear at the head of this form.
>
> An extension of 45 days in the time allowed for filing a completed return is requested.

It is not possible to file a completed return on or before March 15, 1919, for the following reasons:

Unable to execute and file a complete return.

Estimated amount of tax, $4,000; amount of remittance herewith, $1,000.

On May 31, 1919, the Pilliod Lumber Company filed with the Collector of Internal Revenue of the Tenth District of Ohio Form 1120.

Form 1120 was a document on which was printed "Corporation income and profits tax return for calendar year 1918," and beneath this title there appeared in typewriting the following: "The Pilliod Lumber Co., Swanton, Ohio."

This document contained various statements and figures purporting to show gross income, deductions and credits, and net income and invested capital; it also contained various itemized schedules and a statement purporting to show assets and liabilities as of December 31, 1918. This document was neither signed nor sworn to by anyone.

On December 8, 1921, an investigation of the tax liability of the Pilliod Lumber Company for the year 1918 was commenced by an agent of the Internal Revenue Bureau. He examined respondent's books and records, completed his investigation on December 13, 1921, and make a written report of the investigation to the Commissioner of Internal Revenue, a copy of which report was transmitted to the respondent. This report con-

sists of an audit of the books and records of the respondent for the years 1917, 1918, and 1919. (R. 8.)

On September 17, 1923, at the request of the Commissioner of Internal Revenue, the president and treasurer of the respondent executed an affidavit which is as follows:

> We, the undersigned, hereby affirm that our names should have appeared on our income tax return for 1918, and which to the best of our knowledge and belief is correct. We are unable to furnish duplicate signed report, being unable to locate copy, believing same to have been destroyed with other records.
>
> L. N. PILLIOD, *President.*
> T. J. PILLIOD, *Treasurer.*
>
> Sworn to and subscribed before me this 17th day of September, 1923.
>
> O. M. BRASLEY,
> *Notary Public.*

On October 23, 1925, the Commissioner mailed to respondent notice of his determination of a deficiency in respect to the income and excess profits tax of respondent for the year 1918 in the amount of $963.34.

From this determination respondent appealed to the United States Board of Tax Appeals on the ground that the assessment was barred by the statute of limitations. The Board held that neither the tentative return filed in March, 1919, nor the unsworn return filed on May 31, 1919, was the re-

turn required by law, and hence that neither set in motion the statute of limitations. It accordingly entered judgment for petitioner. (R. 8–10.)

On the taxpayer's appeal the Circuit Court of Appeals reversed the Board. (R. 12.) A majority of the judges held that while the statute requiring returns to be verified is to be observed and is of importance, an unsworn return is not necessarily a nullity and that (R. 14) "it would be the duty of the collector to whom such a paper was tendered to refuse to receive it, and the omission would probably be at once corrected." One judge dissented. (R. 15–16.)

Although the Board of Tax Appeals held that neither document constituted the return required by statute, the taxpayer in his petition to the Circuit Court of Appeals for review specifically assigned as error the Board's holding that the paper filed on May 31, 1919, was not such a return as set in motion the statute of limitations, but did not assign as error the holding that the "tentative return" was not such a return, unless it may be said to be included in the very general assignments numbered II and III. (R. 11.) The Circuit Court of Appeals decided the case on the ground that the paper filed May 31, 1919, coupled with the Collector's failure to affirmatively reject it, constituted the filing of the return required by law, and made no mention of the "tentative return" except to state the fact.

It would appear that the taxpayer has abandoned the contention that the "tentative return" set in motion the statute of limitations; but if the Court should consider that point, the petitioner's argument will be found in its brief in *Florsheim & Co.* v. *United States,* No. 118, and *White* v. *Hood Rubber Co.,* No. 414, argued this day.

SUMMARY OF ARGUMENT

Section 277 (a) (2) of the Revenue Act of 1924, in providing that the statute of limitations for the assessment and collection of taxes imposed by the Revenue Act of 1918 shall begin to run from the filing of the taxpayer's income tax return, clearly contemplates the return required by law. That return is defined in Section 239 of the Revenue Act of 1918 which requires (1) that the return shall state specifically the items of gross income and the deductions and credits allowed, and (2) that the return shall be sworn to by two designated officers of the corporation. The document in the instant case, being neither signed nor sworn to by anyone, plainly fails to meet the second of these requirements. Accordingly, it is not the return required by the statute and is insufficient to set the statute of limitations in motion.

While strict compliance with even the formal requirements of taxing statutes is necessary, the provision that a return shall be under oath is more than a mere formality. It is of great practical importance and is necessary to the proper admin-

istration of the tax laws. The affidavit made by respondent in September, 1923, did not operate to start the period of limitation running as of the date of the filing of the unsworn return, May 31, 1919.

The effect of the holding of the Circuit Court of Appeals below, which places a duty upon the Collector to refuse to accept an unverified return, is to make the Government liable for the negligence and laches of its officers, contrary to the well-settled rule of law.

ARGUMENT

AN UNSIGNED AND UNSWORN TAX RETURN IS NOT THE RETURN REQUIRED BY LAW AND THE FILING OF SUCH A RETURN DOES NOT SET IN MOTION THE STATUTE OF LIMITATIONS

It is provided by Section 277 (a) (2) of the Revenue Act of 1924 that taxes imposed by the Revenue Act of 1918 " shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period." The return to which this section has reference is the one defined in Section 239 of the Revenue Act of 1918. That section requires (1) that the return shall state specifically the items of gross income and the deductions and credits allowed, and (2) that the return shall be sworn to by two designated officers of the corporation.

The statute thus squarely places upon the taxpayer the burden of fixing the time when the statute

of limitations begins to run. That time is when the return defined by Section 239 is filed. Anything short of substantial compliance with all the requirements of that section will not constitute the return required by the statue. As was said in *Botany Mills* v. *United States*, 278 U. S. 282, 289, "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." See also *Davis* v. *United States*, 17 C. Cls. 292.

This Court has recognized the necessity of strict compliance with even the formal requirements of taxing statutes. In *Rock Island, etc., R. R.* v. *United States*, 254 U. S. 141, it affirmed the judgment of the Court of Claims in dismissing a petition for the recovery of taxes on the ground that the taxpayer failed to make a formal claim for refund as required by Section 3226, Revised Statutes, as amended by the Act of February 27, 1877. As pointed out by the Court (p. 143), "Men must turn square corners when they deal with the Government."

In respect of its importance and the necessity of strict observance, the requirement of an oath to a return to set in motion the statute of limitations is like the requirement of Section 1324 (a) of the Revenue Act of 1921 that a protest must be specific to entitle a taxpayer to allowance of interest on a refund from date of payment of the tax, which this Court had under consideration in *Girard Trust Co.*

v. *United States*, 270 U. S. 163. There it was said (p. 172):

> The Government's contention is that the distinction made in Section 1324, by which the interest to be paid on refunded taxes is to date from the payment of the taxes in cases where there is a specific protest setting forth in detail the basis and reasons for such protest, and by which the interest is to be dated only from six months after the date of filing the claim for refund or credit when there is no protest, was intended to favor those who furnished to the collecting officers by way of specific protest a valid basis for a refund of the taxes.
>
> We agree with this view. To hold otherwise would be to invite a protest on any pretended ground by taxpayers in every case of payment and would make the protest of no value to the Treasury or the collecting officers. A protest is for the purpose of inviting attention of the taxing officers to the illegality of the collection, so that they may take remedial measures at once. But if protests are based on reasons of no validity, they do not accomplish the public purpose for which they are devised.

The omission on the part of the taxpayer in the instant case is more serious than the omissions which this Court refused to sanction in the *Rock Island Case* and the *Girard Trust Co. case, supra.* In requiring a return to be sworn to, the law has a twofold object in view. The first and principal object is to compel some ascertainable person to

report the truth; the second, to provide a basis for punishing him if he wilfully falsifies. These objects are of the utmost importance to an efficient and equitable administration of the law. They tend to reduce the number of investigations to ascertain the true facts, thereby facilitating the dispatch of public business and lowering its cost. The measure of the income tax is the taxpayer's net income. This information is peculiarly within the knowledge of the taxpayer. The most effective and, indeed, the only practicable way to secure that information and at the same time to make reasonably sure of its accuracy is to require, as has been done in Section 239, *supra,* that it be furnished under the sanctity of an oath.

To condone failure to swear to a tax return as required by Section 239, *supra,* would be to invite carelessness in the preparation of the return and to make its contents less reliable and less valuable to the Treasury Department. Assessment would be more difficult and require a longer time. In the event of wilful falsity, the taxpayer would escape prosecution for perjury, which is one of the penalties provided by law to insure honesty in returns. Cf. *United States* v. *Noveck,* 273 U. S. 202. In view of these consequences Congress could hardly have intended an unsworn tax return to set the statute of limitations in motion.

In *Davis* v. *United States, supra,* it was held that an exporter was not entitled to the allowance of a drawback for internal taxes paid on exported man-

ufactures, because the claim filed with the Commissioner of Internal Revenue failed to include the certificate and affidavit required by the Treasury regulations.

In those cases where State courts have had occasion to pass upon the sufficiency of a return or list which was not given under oath as required by law, it has been held that a taxpayer could take no benefit from such unsworn return or list. *Newell* v. *Whitingham,* 58 Vt. 341; *Lawrence* v. *City of Janesville,* 46 Wis. 364; *Lee* v. *The Commonwealth,* 36 Ky. 311.

In the *Newell case, supra,* where a taxpayer, instead of attaching to his inventory the oath in the precise form given in the statute, added the words "to my best knowledge and belief," it was held that the listers were entitled to double the value of the taxpayer's property as ascertained by themselves, as in the case of wilful omission to make and swear to a legal inventory. The court said (p. 345):

> Where the legislative enactment is plain and certain in terms, and nothing in substance is to be gained by a deviation, and substantial convenience and advantage, without injustice, is subserved by literal compliance, we think such compliance was intended.

In the *Lawrence case, supra,* it was held that an assessor is not bound by an unsworn list and might assess the value of the taxpayer's property by other means.

In the *Lee case, supra,* the Supreme Court of Kentucky said (p. 311):

> Though the statute authorized the assessment of a fine and treble tax only for *failing to give in a proper list,* yet as the law required Lee, as the owner of taxable property, to give in his list on oath, his refusal to verify, by the requisite affidavit, the list offered by himself was a refusal to *give in a list as required by law;* and was as much so, in judgment of law, as would have been a refusal altogether to give any list whatever.

See also *Narragansett Pier Co.* v. *Assessors,* 17 R. I. 452, where a taxpayer's petition for relief was dismissed solely for noncompliance with the statute fixing certain requirements with respect to returns.

The question involved in the case at bar has not heretofore been before the courts, but it is believed that the correct principle for its solution is to be found in the decisions just discussed and particularly in *United States* v. *Updike* (D. C. Neb.), 1 F. (2d) 550, and *Beam* v. *Hamilton* (C. C. A. 6th), 289 Fed. 9, in both of which cases closely analogous situations were presented.

In the *Updike case, supra,* it is said (p. 555):

> The salient feature of the statute of limitations incorporated in this section 250 (d) is that it can be set in motion and started to run only by the affirmative, honest act of the taxpayer, and not otherwise. * * * If the taxpayer fails or refuses to make such a

return as the law contemplates, or willfully makes a false and fraudulent one, proceedings will lie against him to recover the tax at any time.

After dissolution of this corporation, its former secretary sent back to the collector of revenue the blank form provided for making the return for the tax under the law of October 3, 1917, and declared that the corporation was not in existence, and had no officers, directors, or stockholders, and that there was no money or property of the corporation in existence, and said that he was advised that the regulation, meaning the one requiring return for the tax of October 3, 1917, was erroneous. It is contended that the corporation should be deemed to have made return and to have taken sufficient affirmative action to start the statute in its favor because its returns under the 1916 act and the Act of March 3, 1917, being honestly made and filed in July and September, 1917, fairly disclosed its gains and profits for the period covered by the Act of October 3, 1917. The argument is that the corporation, having in this way honestly given the Commissioner the basis to compute the tax under the October 3, 1917, law, and then, having frankly and full disclosed all the facts as to the dissolution and distribution of the assets, and having made clear its claim of no liability, the government's right to the tax, if any it ever had, should be deemed barred; if not in five years after August, 1917, when the returns were made and filed by the cor-

poration, at least five years after the Commissioner was directly and fully informed of all the facts. Full information having been brought to the tax officials, it is claimed the statute started to run.

* * * * *

Under each income tax law there are regulations promulgated to carry out that law, and then blank forms of return are prepared to meet the requirements of each particular law. These blank forms are submitted to the taxpayer, to be filled out and verified by him, and *when he has filled out the blank, added the verification, and delivered the document to the proper officer, then the taxpayer is said to have made and filed return under the designated law.* And the plain meaning of Congress in section 250 (d) is that such a making and filing of return under any one of the revenue acts will start the statute in favor of the taxpayer and against the government. There is nothing in the statute to imply that anything other than such making of return under the particular act would set the statute in motion. (Italics ours.)

The above decision of the District Court was affirmed by the Circuit Court of Appeals for the Eighth Circuit (8 F. (2d) 913) and petition for certiorari was denied (271 U. S. 661).

The *Beam case, supra,* involved the same principle in a different connection. There, in dealing with the requirements of the excess-profits tax provisions of the Act of October 3, 1917, and the regulations made thereunder which required a separate

return of the income from a trade or business with invested capital and the failure of the taxpayer to make such return, although he had made an income-tax return, the court said (p. 14):

> Not only was the excess-profits tax a separate, distinct, and then novel source of revenue, but the statute and regulations, as we have above shown, in express and formal terms required separate and distinct returns thereof, and we think it clear that failure to make a separate return of excess-profits tax is none the less a failure to make the return contemplated by the statute because of the mere fact that the computations on the excess-profits return are to be carried onto Form 1040; the use of that form also is necessary to a complete report. By Section 213 the Commissioner was undoubtedly given authority, with the approval of the Secretary of the Treasury, to require both returns.

It is submitted that if it was proper in the *Beam case, supra,* to subject the taxpayer to the penalty for failure to make the return required by the statute and the Treasury regulations, by parity of reasoning the failure in the instant case to swear to the return as required by Section 239 of the Revenue Act of 1918, *supra,* and the Treasury Regulations thereunder should be held not to set in motion the limitation of Section 277 (a) (2) of the Revenue Act of 1924, *supra.*

The affidavit by respondent was not made until more than four years after a perfect and complete

return was due. On this point the language of the court in *Davis* v. *United States, supra*, is apposite. There, speaking of a claim for allowance of a drawback for internal taxes paid on exports, which claim was not filed in the proper form within the required time, it was said (17 C. Cls. 292, 301):

> When a government declares by law that certain specified acts must be done, in order to a citizen's becoming entitled to a gratuity out of the public Treasury, to which, aside from that law, he would have no right, every one of the acts must be done before he can claim the gratuity.
>
> And when a time is limited within which any of the acts shall be done, the very fact that it is limited is a declaration by the government of its materiality, and constitutes a condition precedent, which must be fulfilled before the right to the gratuity can be fixed. No claimant can say that it does not matter whether he did the act within the required time; for he has no standing as a claimant before the Commissioner unless it was done within that time; nor can any officer of the government, or any court, dispense with the requirement of time, unless express law so authorize; * * *.

As suggested by the Board below, all that the making of the subsequent affidavit indicates is that the Commissioner, in accordance with the Treasury regulations, had treated the return as imperfect and refused to accept it as meeting the requirements of the law.

Assuming that the affidavit is a "verification" of the kind required by the statute the taxpayer contends that it relates back to and makes complete the imperfect return as of time of its filing. This argument concedes that the return when filed was insufficient. If it did not then put in motion the statute of limitations, surely the affidavit could not both put it in motion and accelerate it. If the affidavit has any efficacy, it is to accomplish the filing of a complete return in September, 1923, which was less than five years prior to the deficiency assessment.

Article 407 of Treasury Regulations 45 (1919 ed.), *supra,* which was in effect at the time petitioner filed its unsigned and unsworn return, provided that "Imperfect or incorrect returns will not be accepted as meeting the requirements of the statute." This regulation was ipso facto a rejection of an imperfect return. Though it is *received* it is not *accepted,* and hence it can not be deemed to have been filed.

Emmich v. *United States* (C. C. A. 6th), 298 Fed. 5, certiorari denied, 266 U. S. 608, is readily distinguishable. That was a case involving a criminal prosecution under Section 253 of the Revenue Act of 1921. A careful reading of the opinion makes it clear that the issue involved was whether the defendant was guilty of attempting to evade and defeat the tax. The counts charging perjury and failure to file a return were out of the case.

The question of whether there was a return was only collateral; and the court said that the return, whether sworn to or not, was intended to deceive and defraud the Government. A defendant would hardly be heard to excuse a violation of one law by pleading violation of another.

The Circuit Court of Appeals in the instant case, while recognizing the importance of the statutory requirement that a return shall be verified, held that the collector should have refused to receive the unsworn form and that, inasmuch as the absence of the verification was not noticed until four and one-half years after filing the return must be treated as the return required by statute. The effect of this holding is to make the Government liable for the negligence or laches of its officers contrary to the principle of law first announced by this Court in *United States* v. *Kirkpatrick*, 9 Wheat. 720. This rule has been often approved and was applied in *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, the Court saying (p. 409):

> As presenting another ground of estoppel it is said that the agents in the forestry service and other officers and employees of the Government, with knowledge of what the defendants were doing, not only did not object thereto but impliedly acquiesced therein until after the works were completed and put in operation. This ground also must fail. As a general rule laches or neglect of duty on the part of officers of the Government is

> no defense to a suit by it to enforce a public right or protect a public interest.

See also *Ches. & Del. Canal Co.* v. *United States*, 250 U. S. 123, 125.

The question in the instant case is related in principle to the question of the sufficiency of a tentative return to start the running of the statute of limitations, which a number of the courts have had occasion to consider. The Circuit Court of Appeals for the Fifth Circuit, in *Florsheim Brothers Dry Goods Co., Ltd.* v. *United States*, 29 F. (2d) 895 (now before this Court on certiorari, No. 118), the Court of Claims in *Oak Worsted Mills* v. *United States*, decided December 2, 1929 (not yet reported), and the Board of Tax Appeals in *Appeal of Dallas Brass & Copper Co.*, 3 B. T. A. 856, *Appeal of Matteawan Manufacturing Co.*, 4 B. T. A. 953, *Appeal of Boston Hide & Leather Co.*, 5 B. T. A. 617, *Corona Coal & Coke Co.* v. *Commissioner*, 11 B. T. A. 240, and in this case, has held that the statute of limitations is not set in motion by the filing of a tentative return. The opposite view has been taken by the Circuit Court of Appeals for the First Circuit in *White* v. *Hood Rubber Co.*, 33 F. (2d) 739 (now before this Court on certiorari, No. 414), by the Circuit Court of Appeals for the Ninth Circuit in *Rasmussen* v. *Brownfield-Canty Carpet Co.*, 31 F. (2d) 89 (in which two judges refrained from expressing an opinion on the point), and by the District Court for the Eastern District of South

Carolina in *Brandon Corporation* v. *Jones*, 33 F. (2d) 969.

The statute of limitations begins to run only from the filing of a return or returns covering the entire taxable year. *Paso Robles Mercantile Co.* v. *Commissioner* (C. C. A. 9th), 33 F. (2d) 653 (certiorari denied, 280 U. S. 73A); *Willingham Loan & Trust Co.* v. *Commissioner* (C. C. A. 5th), decided November 22, 1929 (not yet reported).

CONCLUSION

It is respectfully submitted that the judgment below should be reversed.

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Special Assistants to the Attorney General.

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